011462 MAR - 1 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

ROSS B. LINNEEN, HUSBAND;
KIM ANN LINNEEN, WIFE,
Petitioners,

v.

GILA RIVER INDIAN COMMUNITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

TOM RAWLES
LINDA RAWLES

JAMES P. MUELLER
Counsel of Record
DOUGLAS V. DRURY
MUELLER & DRURY, P.C.
11000 NORTH SCOTTSDALE ROAD
SUITE 181
SCOTTSDALE, AZ 85254
(480) 368-5511

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

29pp

Questions Presented for Review

Petitioners sought redress in the courts below for the violation of their fundamental civil liberties. However, because Respondents asserted tribal sovereign immunity, Petitioners have been denied any forum in which to seek relief.

- Question: Should tribal sovereign immunity be limited to the extent necessary to provide Petitioners with an opportunity and a mechanism for seeking redress for the violation of their fundamental civil liberties?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction 1

Statement of the Case 1

Reasons for Granting the Writ 3

I. The United States Has a Duty to Protect Petitioners' Fundamental Civil Liberties 3

II. Fundamental Civil Liberties do not Depend Upon a Legislative Majority . . . 5

Conclusion 8

Appendix 1a

Appendix A
9th Circuit Opinion - 01/07/02 . . . . . 1a

Appendix B
District Court Order - 03/02/99 . . . . . 7a

Table of Authorities

CASES — Page

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) . . . . . passim

Johnson v. M'Intosh,
8 Wheat. 534, 574, 5 L.Ed. 681 (1823) 4

Board of Trustees of the Sisseton-Wahpeton Community College v. Wynde,
18 Ind.L.Rptr. 6033, (N. Plains Intertribal Ct. (App. 1990)) 5

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.
523 U.S. 751 (1998) 5, 8

Bush v. Gore,
__ U.S. __ , 121 S.Ct. 525, 557 (2000) 7

Talton v. Mayes,
163 U.S. 376 (1896) 8

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 8

Gideon v. Wainright,
372 U.S. 335 (1963) 7

Miranda v. Arizona,
384 U.S. 386 (1966) 7

New York Times v. Sullivan,
376 U.S. 254 (1964) 7

Engle v. Vitale,
370 U.S. 421 (1962) 7

Petition For Writ of Certiorari

Petitioners Ross Lineen and Kim Lineen respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The district court's opinion granting summary judgment in favor of respondent Gila River Indian Community is unpublished (Appendix "A"). The court of appeals' opinion upholding the grant of summary judgment is reported at ___ F.3d ___ (2002) (Appendix "B").

Statement of Jurisdiction

The Court of Appeals entered its opinion and order January 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statement of the Case

I. The Violation of Petitioners' Fundamental Civil Liberties

After inadvertently wandering onto the Gila River Indian Community's land on January 1, 1996, while exercising their dogs, Petitioners were confronted by a tribal officer. During the ensuing three to four hour encounter, the tribal officer:

1. Threatened to shoot the Petitioners and bury their bodies in the desert where they would never be found;

2. Held Petitioners at gun point, including holding a gun to their heads, and unlawfully and unjustifiably refused to let them leave;

3. Threatened to seize and/or destroy their property, including their two dogs;

4. Told them of their need to discover/accept Jesus Christ as their personal Lord and Savior, especially because they were going to die that day; and

5. Railed against the outrages that have been perpetrated upon Native Americans by the White Man over hundreds of years.

These facts, which Respondents acknowledged in their brief below "portray a tale of abuse . . ." (Respondents' Ninth Circuit Answering Brief, at 11), have been accepted as true in the courts below for the purpose of resolving Respondents' tribal sovereign immunity claim. Thus, this Court too must accept this tale of abuse and terror as its starting point, as the foundation for the legal analysis which follows.

There is no doubt that these accepted facts constitute violations of Petitioners' fundamental civil liberties. Petitioners' freedom of religion, freedom of speech, freedom of association and due process protections were all callously cast aside during these terrorizing acts of a governmental entity. Furthermore, the fact that these abuses and terrors

were inflicted upon Petitioners because they are White constitutes a violation of their equal protection rights.[1]

In short, and to the point, some of America's most cherished and time-honored liberty interests were trampled this day. These fundamental civil liberties were not bestowed upon Americans by the United States Constitution; rather, the Constitution acknowledged their pre-Constitutional existence and pledged the Government's protection and preservation of these liberties. As Thomas Jefferson wrote in the Declaration of Independence, after noting that Man possesses certain God-given and inalienable rights: "To secure these rights, governments are instituted among men . . . ." Thus, governments exist to protect and secure the fundamental civil liberties directly at issue here, and Petitioners ask this Court to do exactly that – protect their liberties.

Reasons for Granting the Writ

I. The United States Has a Duty to Protect Petitioners' Fundamental Civil Liberties

Protecting fundamental civil liberties, albeit different ones, is exactly what this Court did when it decided Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In Oliphant, the tribe tried to exercise criminal jurisdiction over non-Indians for crimes committed on the reservation. The tribe in Oliphant argued that the exercise of criminal jurisdiction was a result of and necessary to protect its "retained national sovereignty." Id. at 196. This Court disagreed.

---

[1] Petitioners' claim includes other, more traditional common law causes of action as well.

Citing Johnson v. M'Intosh, 8 Wheat. 534, 574, 5 L. Ed. 681 (1823), the Oliphant Court noted that a tribe's right to complete sovereignty is necessarily diminished when its assertion of sovereignty conflicts "with the interests of this overriding sovereignty (the United States)." Oliphant, 435 U.S. at 209. The Court was very clear in identifying the interest the overriding sovereignty needed to protect.

> From the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.

Id. at 210. Thus, even though the passage of the Indian Civil Rights Act of 1968 attempted to provide some form of due process protections (id. at 197-98), those protections were not enough to satisfy the Oliphant Court. The need for the United States to protect Non-Indians' fundamental civil liberties overrode the tribe's need for absolute sovereignty. Tribal sovereignty had to yield to personal freedoms and to the United States Government's duty to protect those freedoms.

In the case sub judice, Respondents argue that the tribe's assertion of sovereign immunity is necessary to protect its absolute and total sovereignty. They contend that sovereign immunity is essential to the preservation of "tribal self-governance." Respondents' Ninth Circuit Answering Brief, at 12. They even rely upon and quote from a tribal decision that equates the two, that demands total sovereignty for tribes and urges assertions of sovereign immunity as the vehicle for obtaining and/or preserving that complete

sovereignty. Id, at 10-11; Board of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Ind. L. Rptr. 6033 (N. Plains Intertribal Ct. (App. 1990)).

Yet, since Oliphant, tribal sovereignty has been less than absolute when confronted with the personal liberty interests, the fundamental civil liberties of non-Indians. Tribal sovereignty has already been made to yield to the civil liberties of non-Indians. The question before this Court is whether the fundamental civil liberties at stake here also require a diminishment of the tribe's sovereignty.

On their face, there is nothing less significant about these liberties then those involved in Oliphant. The right to be free from a threatened summary execution is just as important as the right to have non-Indians on a jury. The right to be free from compulsive, governmental evangelism is equally as sacred as the right to confront and cross-examine witnesses. The due process protections against the deprivation of liberty and the loss of property are just as cherished as the privilege against self-incrimination. All are cut from the same cloth; all arise from the same source; all deserve the same protection.

II. Fundamental Civil Liberties Do Not Depend Upon a Legislative Majority

No analysis of the pending issue can proceed any further without a discussion of Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). In Kiowa, this Court declined to abrogate tribal sovereign immunity in a suit over a commercial transaction that occurred off Indian lands. The majority of the Court noted that: (1) tribal sovereign immunity developed almost by accident; (2) that it was created by the judiciary and can be

abrogated or limited by the judiciary; and (3) that there are serious doubts about the continuing validity of tribal sovereign immunity in light of the emergence of tribes into the mainstream of the nation's commerce. 523 U.S. at 756-58. The Court also reflected upon the fact that tribal sovereign immunity can be particularly harsh, even unjust, when the person seeking relief is a tort victim who had no opportunity to negotiate a potential waiver of the tribe's immunity.[2] Id. at 758.

Despite these hesitations, the Court decided the issue of tribal sovereign immunity should be deferred to Congress. The Court felt that the balancing of the competing economic and policy matters was best left to the legislative process. Id. at 759.

Petitioners respect that deference in the context of a commercial transaction.[3] The legislative process, as imperfect and imprecise as it is, is designed to identify and implement the will of the majority. However, fundamental civil liberties are never subject to the whims and pressures of

---

[2] It is instructive to note that the two non-Indians the tribes desired to exercise criminal jurisdiction over in Oliphant were residents of the reservations. They chose to live on the reservations; thus, their claim for this Court's protection of their fundamental civil liberties would appear to be weaker than Petitioners', who made no voluntary choice and had no opportunity to negotiate a waiver of the tribe's immunity.

[3] Petitioners bemoan the growing legal distinction between personal liberty interests and property rights, but recognize that that distinction is not an issue in this case and need not, therefore, be addressed.

majority will. They stand above the legislative process, sacred and inviolate.

As previously noted, governments exist to protect these fundamental civil liberties, not to subject them to a referendum, not to subject them to, in James Madison's words, the "tyranny of the majority." No vote of Congress was necessary to establish these fundamental civil liberties and no vote of Congress, no matter how overwhelming, can detract from them. There is no weighing or balancing of competing policy issues when fundamental civil liberties are at stake. When it comes to fundamental civil liberties, the legislative process is not just irrelevant, it is dangerous.

The role of ultimate protector of fundamental civil liberties has always been the one assigned to the federal judiciary, especially this Court. Indeed, this Court's protection of basic human liberty has been called a "fundamental constitutional principle." Bush v. Gore, ___ U.S. ___, 121 S. Ct. 525, 557 (2000) (Breyer, J., dissenting). Whether it involved the right to counsel,[4] the right to remain silent,[5] freedom of speech[6] or freedom of religion,[7] this Court, not Congress, has been the branch of the federal government that has afforded protection and preservation of fundamental civil liberties. This Court, not Congress, has taken the lead in ensuring that fundamental civil liberties are not diluted by statute or practice. This Court, not Congress, played this indispensable role of protector in Oliphant. This Court, not Congress, stands as the watchman on the walls of

---

[4] Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] Miranda v. Arizona, 384 U.S. 386 (1966).

[6] New York Times v. Sullivan, 376 U.S. 254 (1964).

[7] Engle v. Vitale, 370 U.S. 421 (1962).

freedom. And this Court, not Congress, should protect Petitioners' fundamental civil liberties now.

Petitioners do not ask this Court to overrule Kiowa or any other prior case. Unlike the Petitioner in Talton v. Mayes, 163 U.S. 376 (1896), who was a tribal member being subjected to tribal justice, Petitioners are non-Indians seeking a ruling that there is a remedy for the violation of their fundamental civil liberties. Unlike the Petitioner in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), who was a tribal member asking this Court to rewrite internal tribal laws on membership, Petitioners do not seek to limit the tribe's legitimate exercise of local, self-government power. Instead, they merely ask the Court to allow the tribe to be held accountable for the governmental abuse of power inflicted on non-Indians.

Petitioners do not even ask this Court to limit the application of Kiowa to its facts. Kiowa may, in fact, continue to be the guiding precedent in cases that differ from it. But, that guiding precedent should not reach these facts, should not apply so as to leave these Petitioners' fundamental civil liberties unprotected and their violation unredressed. The importance of fundamental civil liberties to our cherished notions of freedom merely requires that this Court hold that in cases such as this, a tribe's sovereign immunity must yield. Immunity must yield to the time-honored commitment of the higher sovereign to protect non-Indians "from unwarranted intrusions on their personal liberty." Oliphant, 435 U.S. at 210.

Conclusion

The United States of America is the only country in the history of the world to have been founded upon a

philosophical ideal: individual human liberty. It was this commitment to freedom that spawned a revolution and it was the listing of these freedoms in the Bill of Rights that led to the ratification of our Constitution. Our Government's protection of basic human liberties has precipitated the spillage of American blood and the erection of monuments to the glory and sustaining value of human freedom.

This Court has played an honorable and notable role in the perpetual protection of those freedoms we, as a people, hold dearest. Petitioners ask this Court to take one more step along that storied path. Petitioners ask that this Court recognize, yet again, that the United States' commitment to the fundamental civil liberties of its people surpasses Respondents' need for total and absolute sovereignty. Individual freedoms do not stand, can not stand, on the shifting sands of majority will. It is up to this Court, not Congress, to vindicate the fundamental constitutional principle of protecting basic human liberty.

Petitioners humbly request this Court to reverse the decisions below and hold that Respondents' immunity must yield to Petitioners' fundamental civil liberties.

Respectfully Submitted,

James P. Mueller
Counsel of Record
Douglas V. Drury
Mueller & Drury, P.C.
Linda Rawles
Tom Rawles
11000 N. Scottsdale Rd.
Suite 181
Scottsdale, Arizona 85254
(480) 368-5511

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15120

[Filed January 7, 2002]

ROSS B. LINNEEN, husband;
KIM ANN LINNEEN, wife,
Plaintiffs-Appellants,

v.

GILA RIVER INDIAN COMMUNITY;
MARY THOMAS, Governor of the
Gila River Indian Community;
RALPH ANDREWS, Gila River Tribal
Ranger, in his official and individual capacity;
UNITED STATES OF AMERICA;
INTERIOR, DEPARTMENT OF;
BUDDY SHAPP, BIA Officer, in his individual
and official capacity;
INDIAN AFFAIRS, Bureau of,
Defendants-Appellees.

On Appeal From
United States District Court
for the District of Arizona
D.C. No. CV-97-02708-RGS
Roger G. Strand, District Judge, Presiding

JUDGES:
Before: Henry A. Politz,* William A. Fletcher, and Raymond C. Fisher, Circuit Judges. Opinion by Judge William A. Fletcher.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs Ross and Kim Linneen filed a complaint in district court seeking monetary damages under 42 U.S.C. §1983, the United States Constitution, Arizona state law, and the bylaws of the Gila River Indian Community, based on allegations that a Gila ranger unlawfully detained and threatened them during an encounter on Gila land. The district court dismissed the complaint as to the Gila River Indian Community, and as to Mary Thomas, Governor of the Community, and Ralph Andrews, Gila River Tribal Ranger, in their official capacities, based on tribal sovereign immunity. We have jurisdiction under 28 U.S.C. §1291 and affirm.

I

The Linneens drove into the desert south of Chandler, Arizona on January 1, 1996, to take their dogs for a walk. The location they chose was on property belonging to the Gila River Indian Community ("Community"). Buddy Shapp of the Bureau of Indian Affairs spotted them, and Ralph Andrews, a ranger for the Community, was dispatched to investigate.

---

* Honorable Henry A. Politz, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

The Linneens allege that the following events took place: When Andrews arrived, he jumped out of his truck, drew his gun, and crouched behind the truck door. He ordered Ross to turn around and put his arms on his head. He searched the Linneens and their car. He kept the Linneens in custody for three hours, during which time he told them that they were guilty of various offenses that would result in jail time; told them that their possessions would be impounded and their dogs destroyed; held a gun to their heads; complained about injustices suffered by Native Americans at the hands of Caucasians; and lectured them on religious doctrine. Andrews finally released the Linneens after citing them for criminal trespass. The charges against the Linneens were later dismissed.

The Linneens filed a complaint in federal district court, naming as defendants the Gila Community, Mary Thomas, Andrews, the United States, the Department of Interior, the Bureau of Indian Affairs, and Shapp. The complaint alleged six federal and state law causes of action, for which the Linneens sought compensatory damages of $8 million, in addition to costs and attorneys' fees.

The district court held that it lacked subject matter jurisdiction for the claims against the Community, and for the claims against Thomas and Andrews in their official capacities, because of tribal sovereign immunity. The court held further that it lacked jurisdiction over Andrews, to the extent he was sued in his individual capacity, because the Linneens had not exhausted their tribal remedies. The court dismissed the claims against the United States based on failure to comply with the Federal Tort Claims Act.

Attorneys for the tribe and the Linneens filed a joint motion and stipulation for entry of final judgment in district court pursuant to Federal Rule of Civil Procedure 54. Pursuant to the stipulation, the district court entered a final judgment granting defendants' motion to dismiss the complaint as to the Community, and as to Thomas and Andrews in their official capacities. The Linneens timely appealed this judgment.

II

We review de novo the district court's conclusion that it lacks subject matter jurisdiction. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996). We also review de novo questions of tribal sovereign immunity. *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

III

The only issue raised in this appeal is whether the district court correctly held that tribal sovereign immunity bars the Linneens' claims against the Community, and against Thomas and Andrews in their official capacities. Because the Linneens' suit against the Community and against Thomas and Andrews in their official capacities is a suit against the tribe, it is barred by tribal sovereign immunity unless that immunity has been abrogated or waived.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978). "This immunity extends to tribal officials when acting in their

official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1013 n. 8 (9th Cir. 1981). In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 140 L. Ed. 2d 981, 118 S. Ct. 1700 (1998), the Supreme Court recently precluded a company from suing an Indian tribe in state court based on a commercial obligation, explaining that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

Here, the suit arises from defendant Andrews' alleged misconduct during his official duties as a tribal ranger on the Community's land. Congress has not abrogated tribal sovereign immunity for such acts committed on tribal land by a tribal officer.

Further, the Linneens have not shown that the Community has waived its immunity. *See Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) (stating the "fundamental principle that tribal sovereign immunity remains intact unless surrendered in express and unequivocal terms"). They contend that the Gila Corporate Charter contains such a waiver, but we disagree. The charter provides:

> The Community . . . shall have the following corporate powers . . . : . . . To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and be sued shall not be deemed a consent by the said Community or by the United States to the levy of any

> judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.

(Emphasis added.). Such "sue and be sued" clauses waive immunity with respect to a tribe's corporate activities, but not with respect to its governmental activities. *See Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376, 1382-83 (Ariz. Ct. App. 1983). The Indian Reorganization Act, 25 U.S.C. § 476, authorizes Indian tribes to organize as a constitutional entity, and §477 of the Act authorizes organization of a corporate entity. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). Most courts that have considered the issue have recognized the distinctness of these two entities. *Id.* (citing numerous cases). The "sue and be sued" clause in the Community's corporate charter in no way affects the sovereign immunity of the Community as a constitutional, or governmental, entity. We find no waiver here because the alleged actions that form the basis of this suit are clearly governmental rather than corporate in nature.

We therefore AFFIRM the district court's dismissal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 97-2708-PHX-RGS

[Filed March 2, 1999]

ROSS B. LINNEEN and	)
KIM ANN LINNEEN,	)
Plaintiffs,	)
	)
v.	)
	)
GILA RIVER INDIAN COMMUNITY, et al.,	)
Defendants.	)
	)

ORDER

I. BACKGROUND

On December 31, 1997, Plaintiffs filed their complaint against Defendants, Gila River Indian Community, Mary Thomas, Governor of the Gila River Indian Community, Ralph Andrews, a Gila River Indian Ranger, United States of America, Department of Interior, Bureau of Indian Affairs and Buddy Shapp, BIA officer, alleging violations of 42 U.S.C. §1983, the U.S. Constitution, Arizona state law and the Constitution and bylaws of the Gila River Indian Community.

The facts indicate that on January 1, 1996, Plaintiffs drove to the desert south of Chandler to walk their dogs. Unbeknownst to them, the location where they stopped to walk their dogs was property belonging to the Gila River Indian Community. Bureau of Indian Affairs law enforcement officer, Buddy Shapp spotted Plaintiffs' vehicle and radioed dispatch to send a tribal ranger to check out the vehicle. Defendant Ralph Andrews was dispatched to investigate.

Plaintiff contends that when Officer Andrews arrived, despite Plaintiff Ross Linneen waiving at him, Andrews jumped out of his vehicle, drew his gun, told Ross Linneen to turn around, put his hand on his head and not to move. Plaintiffs allege that Defendant Andrews told Plaintiffs that they were guilty of civil and criminal trespassing and that jail time would be inevitable. Plaintiffs allege that Defendant Andrews held them at gunpoint for about three hours, threatening their lives, complaining about the injustices imposed on Native Americans by the "people like them"[1] and, further, told Plaintiffs to "beg God for forgiveness." Plaintiff contend that during the time that Defendant Andrews was holding them at gunpoint, they were in fear for their lives and continually begged Andrews to let them go. Eventually, Defendant Andrews cited Plaintiffs for trespassing and released them on their own recognizance.

On May 18, 1998, Defendants, the Gila River Indian Community, Mary Thomas and Ralph Andrews, filed a motion to dismiss requesting that the Court dismiss Plaintiffs'

---

[1] Plaintiffs are Caucasian and Plaintiffs believe Defendant Andrews is Native American.

complaint since (1) the Court lacks subject matter jurisdiction, (2) the Court lacks personal jurisdiction over Defendants, (3) this Court is an improper venue, (4) Plaintiffs fail to state a claim upon which relief can be granted, and (5) Plaintiffs failed to join an indispensable party. Additionally, on July 21, 1998, Defendant, the United States of America, filed a motion to dismiss alleging that Plaintiffs' claims under the Federal Tort Claims Act ("FTCA") must be dismissed since they failed to comply with the Act. Oral argument was heard on Defendants, Gila Indian River Community, Mary Thomas and Ralph Andrews' motion to dismiss on November 30, 1998. The Court, after having considered all the issues raised by the Parties, finds that Plaintiffs' complaint must be dismissed since the Court lacks subject matter jurisdiction over Plaintiffs' claims. Further, the Court finds that Plaintiffs' claims against the United States must be dismissed since it lacks jurisdiction to hear Plaintiffs' claim under the FTCA.

II. DISCUSSION

A. Standard of Review

Dismissal for failure to state a claim is proper only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations. *Cervantes v. City of San Diego,* 5 F.3d 1273, 1274 (1993). All allegations of material facts are taken as true and construed in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). "The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence to support his claim." *Cervantes,* 5 F.3d at 1274.

B. Subject Matter Jurisdiction

Defendants, the Gila River Indian Community, Mary Thomas and Ralph Andrews, argue that the Court must dismiss Plaintiffs' claims against them since they are immune from suit. In *Big Springs v. U.S. Bureau of Indian Affairs,* 767 F.2d 614 (9th Cir.1985), cert. denied, 106 S.Ct. 2914 (1986), the Court held that Indian tribes, as sovereign entities, are generally immune from suit. *Id.* at 617; *see also Santa Clara Pueblo v. Martinez,* 98 S.Ct. 1670, 1677 (1978).

However, a tribe may waive its sovereign immunity by consenting to suit in its constitution or a tribal ordinance. *Big Springs,* 767 F.2d at 617. Citing the Corporate Charter of the Gila Indian River Pima-Maricopa Indian Community ("Charter"), Plaintiffs argue that the Gila River Indian Community waived its sovereign immunity. Section 5 of the Charter provides, in pertinent part:

> The Community, subject to any restrictions contained in the Constitution and By-laws of the United States, or in the Constitution and By-Laws of the said Community, shall have the following corporate powers. . .
>
> (b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:
>
> (i) To sue and to be sued in

> courts of competent jurisdiction within the United States
> . . . .

(Doc. 18, exh. B at 1-4). But, in *S. Unique v. Gila River Pima-Maricopa,* 674 P.2d 1376, 1382-83 (Ariz.App. 1983), the Court held that "the sue and be sued" clause contained in the Corporate Charter has application only to transactions where the Indian Corporation is clearly acting in its capacity as a business corporation. (Emphasis added).

Further, Section 1.327 of the Gila River Indian Community's Courts and Procedures Code, passed pursuant to the powers of the Gila River Indian Community Council in Article XV of the Tribe's Constitution, states:

> Nothing contained within this ordinance shall constitute waiver or renunciation of the sovereign immunity of the Gila River Indian Community from suit, which immunity is hereby reaffirmed.

Therefore, the Court finds that the Gila River Indian Community has not waived its sovereign immunity. Accordingly, the Court finds that it lacks subject matter jurisdiction over the Gila River Indian Community and, thus, will grant Defendants motion to dismiss as to Defendant, the Gila River Indian Community. Furthermore, the Court finds that it lacks subject matter jurisdiction over Defendants, Mary Thomas, Governor of the Gila River Indian Community, and

Ralph Andrews to the extent that they are named in their official capacities. See *United* States v. *Oregon,* 657 F.2d 1009, 1012 n8 (9th Cir.1982) (" [sovereign immunity] also extends to tribal officials when acting in their official capacity and within their scope of authority"); *Davis v. Littel2,* 398 F.2d 83, 84-85 (9th Cir. 1968) cert. denied, 89 S.Ct. 621 (1969).

With respect to Plaintiffs' claims against Ralph Andrews in his individual capacity, the Court finds that it lacks jurisdiction since Plaintiffs failed to exhaust remedies available to them in tribal court. *See Nat. Farmers Union Ins. Co. v. Crow Tribe of Indians*, 105 S.Ct. 2447, 2452 (1985) (holding that "until petitioners have exhausted the remedies available to them in Tribal Court system, ... it would be premature for a federal court to consider any relief."); *see also White v. Pueblo of San Juan,* 728 F.2d 1307 (10th Cir. 1984) (finding that exhaustion requirement is not excused despite allegation that the plaintiffs felt it would be futile to pursue the tribal remedy.)

Alternatively, Plaintiffs request that the Court stay these proceedings until the Tribal Court has had the opportunity to consider whether it can exercise jurisdiction over Plaintiffs' claims. Accordingly, the Court will stay these proceedings pending the Tribal Court's resolution of Plaintiffs' claims.

Also pending before the Court is Defendant, the United States' motion to dismiss. Therein, the United States argues that Plaintiffs' claim must be dismissed since Plaintiffs failed to comply with the Federal Tort Claims Act.

28 U.S.C. §2675(a) provides, in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages for injury . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

Plaintiffs argue that since six months have elapsed since they filed their claim with the administrative agency on December 29, 1997, Defendant's arguments are moot. The Court disagrees.

In *Jerves v. United States,* 966 F.2d 517 (9th Cir. 1992), as a result of falling and breaking her leg on the Pearl Harbor Naval Base Commissary, the plaintiff filed her claim with the Naval Legal Service Office, the appropriate federal agency. However, less than five months later, the plaintiff filed an action in the federal district court. There, the Court held that it lacked subject matter jurisdiction because the plaintiff failed to comply with the statutory requirements of the FTCA.

Similarly here, Plaintiffs submitted their tort claim to the administrative agency on December 29, 1997. Three days later on December 31, 1997, Plaintiffs filed their complaint in federal court. Accordingly, because Plaintiffs failed to

comply with the requirements of the act and because the administrative claims requirements are jurisdictional in nature, *Cadwalder v. U.S.*, 45 F.3d 297, 300 (9th Cir. 1995), the Court finds that it lacks subject matter jurisdiction to hear Plaintiffs' federal tort claim against the United States.

IT IS THEREFORE ORDERED granting Defendants motion to dismiss. (Doc. 7).

IT IS FURTHER ORDERED staying these proceedings pending the Tribal Court resolution of Plaintiffs' claims.

IT IS FURTHER ORDERED granting Defendant United States' motion to dismiss. (Doc. 19).

DATED this 28th day of February, 1999.

/s/_____
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE